IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 998 of 2007.

Reserved on: 25.10.2007.

Decided on: 31.10.2007.

Shri Hem Singh. … … Petitioner.

Versus

HPSEB & Ors. … … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the Petitioner:	**Mr. G.R. Palsra, Advocate.**
For Respondents No.1 & 3:	**Mr. Shrawan Dogra, Advocate.**
For Respondent No.2:	**Mr. M.S. Chandel, Advocate General with Ms. Meenakshi Sharma, Deputy Advocate General.**

Rajiv Sharma, Judge:

A challenge has been laid to Annexure P-1, dated 19th April, 2007 whereby the State government had refused to make the reference to the Labour Court-cum-Industrial Tribunal.

The brief facts necessary for the adjudication of this petition are that the petitioner (hereinafter referred to as the workman for convenient sake) was engaged on 25.12.1994 on daily wage basis

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Whether reporters of local papers may be allowed to see the judgment? Yes.

in the H.P.S.E.B. Sub-Division Kataula under the H.P.S.E.B. Division, Mandi. As per the averments contained in the writ petition, the workman was dis-engaged with effect from 1.9.1998 without complying with the mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The workman sent a demand notice to the XEN, HPSEB, Mandi on 24.9.2005. The employer had filed reply to the demand notice sent by the workman. The workman had filed rejoinder to the reply filed by the employer. The Labour Officer-cum-Conciliation Officer, Mandi tried to settle the matter, but he could not succeed and ultimately he sent the failure report to the State Government. The State Government had refused to refer the matter to the Labour Court-cum-Industrial Tribunal vide communication No.11-23/84(Lab)I.D./06-Mandi on 19th April, 2007 primarily on the ground that there was a delay of seven years in raising the industrial dispute.

Mr. G.R. Palsra had strenuously argued that the order dated 19th April, 2007 is not sustainable in the eyes of law and the State Government was bound to refer the matter to the Labour Court-cum-Industrial Tribunal, Dharamshala. He then contended that the State Government has no jurisdiction to enter into the merits of the dispute and once the demand has been raised and there were issues requiring consideration, the State Government was bound to refer the matter to the Labour Court-cum-Industrial Tribunal. The learned Advocate General and Mr. Shrawan Dogra appearing

on behalf of the respondents have supported the communication dated 19th April, 2007.

I have heard the learned counsel for the parties and have also gone through the record.

The workman was engaged on 25.12.1994. He was dis-engaged on 1st September, 1998. It appears from the pleadings of the parties that the workman had preferred an O.A. bearing No.497 of 1998 before the H.P. State Administrative Tribunal against the order dated 1st September, 1998. The original application was dismissed by the learned H.P. State Administrative Tribunal. The workman had raised a demand on 24.9.2005. It is evident from the man-days charge annexed with the reply of respondents No.1 and 3 that the workman had completed more than 240 days in a block of 12 calendar months preceding his retrenchment on 24.5.1998. The workman had also averred in his demand notice that the persons junior to him, namely, Shri Ladhe Ram and Shri Chhape Ram were retained while retrenching his services.

It is a settled law by now that the State Government only exercises the administrative powers while referring the matter to the Labour Court or Industrial Tribunal. The State Government has no jurisdiction to decide the lis itself and come to the conclusion as in the present case that the dispute raised by the workman was frivolous or vexatious. It was incumbent upon the State Government to make the reference to the Labour Court to adjudicate upon the same. The question of delay or laches could

be considered by the Labour Court-cum-Industrial Tribunal while determining the relief.

The Hon'ble Supreme Court in **The M.P. Irrigation Karamchari Sangh v. State of M.P. and another, AIR 1985 SC 860** has held that the Government had exceeded its jurisdiction in refusing to refer the dispute to Tribunal by making its own assessment unilaterally of the reasonableness of demands on merits. Their Lordships have held as under:-

> **"We have considered the rival contentions raised before us. The High Court apparently has relied upon the following passage in Bombay Union of Journalists v. State of Bombay AIR 1964 SC 1617:**
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> > **" …. But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5) or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not."**

We find that the approach made by the High Court was wrong and the reliance on the above passage on the facts of this case, is misplaced and unsupportable. This Court had made it clear in the same Judgment in the sentence preceding the passage quoted above that it was the province of the Industrial Tribunal to decide the disputed questions of fact.

> **" …. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal…… "**

Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. S. 10 permits appropriate Government to determine whether dispute 'exists or is apprehended' and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi judicial Tribunal by an administrative authority namely the Appropriate Government. In our opinion, the reasons given by the State Government to decline reference are beyond the powers of the Government under the relevant sections of the Industrial Disputes Act. What the State Government has done in this case is not a prima facie examination of the merits of

the question involved. To say that granting of dearness allowance equal to that of the employees of the Central Government would cost additional financial burden on the Government is to make a unilateral decision without necessary evidence and without giving an opportunity to the workmen to rebut this conclusion. This virtually amounts to a final adjudication of the demand itself. The demand can never be characterized as either perverse or frivolous. The conclusion so arrived at robs the employees of an opportunity to place evidence before the Tribunal and to substantiate the reasonableness of the demand.

Same is the case with the conclusion arrived at by the High Court accepting the stand of the State Government that the employees were not entitled to the Chambal allowance as the same was included in the consolidated pay. This question, in fact, relates to the conditions of service of the employees. What exactly are the conditions of service of the employees and in what manner their conditions of service could be improved are matters which are the special preserve of the appropriate Tribunals to be decided in adjudicatory processes and are not ones to be decided by the Government on a prima facie examination of the demand. This demand again can never be said to be either perverse or frivolous.

There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should not be

very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S. 12(5) of the Industrial Disputes Act nugatory.

We have no hesitation to hold that in this case, the Government had exceeded its jurisdiction in refusing to refer the dispute to the Tribunal by making its own assessment unilaterally of the reasonableness of the demands on merits. The High Court erred in accepting the plea of the Government that refusal to refer the demands in this case was justified. The demands raised in this case have necessarily to be decided by the appropriate Tribunal on merits."

Similarly, the Hon'ble Supreme Court in **Dhanbad Colliery Karamchari Sangh Versus Union of India and Others, 1991 Supp (2) SCC 10** has held that the Government cannot itself decide the dispute on the ground that Union failed to establish that workmen were engaged in prohibited categories under Contract Labour (Regulation and Abolition) Act, 1970. Their Lordships of Supreme Court have held as under:-

"After hearing learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the opinion that this appeal must succeed. The Central Government instead of referring the dispute for adjudication to the appropriate Industrial Court

under Section 10 of the Industrial Disputes Act, 1947, itself decided the dispute which is not permissible under the law. We, accordingly, allow the appeal, set aside the order of the High Court and of the Central Government and direct the Central Government to refer the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947. We further direct the Central Government to make the reference within three months."

The Hon'ble Supreme Court in **Telco Convoy Drivers Mazdoor Sangh and another, v. State of Bihar and others, AIR 1989 SC 1565** has held that the Government while considering the question whether reference should be made or not cannot delve into merits of dispute and determine the lis itself. Their Lordships of the Supreme Court have observed as under:

"Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh's case (supra), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view

to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory."

Similarly, the Hon'ble Supreme Court in **Abad Dairy Dudh Vitran Kendra Sanchalak Mandal and Abad Dairy and others, 1990 (60) F.L.R. 282** has held as under:-

"We have heard counsel for the appellant as well as counsel for the respondents. We are of the opinion that having regard to the facts of the case as well as the voluminous evidence sought to be adduced by both sides, the question as to whether the members of the association are workmen or not requires detailed investigation of facts. It is true that there appeared to be certain agreements entered into between the respondents and the appellants but it is the case of the appellants that, agreement apart, there is plenty of evidence in the form of instructions and circulars issued by the respondents which would show that the members of the association were really workmen and not commission agents as alleged. In fact, in pursuance of the permission given by this Court to file affidavits the parties have filed affidavits running to several pages setting out facts in support of their respective contentions. We have also heard both counsel for sometime and are satisfied that the issue requires detailed examination of facts and can be satisfactorily adjudicated upon only by a Tribunal.

We are of opinion that neither a writ proceeding in the High Court nor an appeal under Article 136 is the proper forum in which these factual contentions and allegations should be gone into. The High Court itself has observed at various places in its judgment that the nature of the dispute between the parties and the facts and circumstances were such that a writ petition was not the appropriate forum to enter into such facts but seems to have allowed itself to be persuaded to go into the question perhaps because the counsel on both sides were not adverse to that course. We however think that the High Court should not have done this but, instead, should have directed the Government to refer the disputes between the parties to an Industrial Tribunal, making the issue of the jurisdictional fact, viz., as to "whether the appellants workmen?" also one of the terms of reference. We say this because, though there are agreements between the parties, not only is the interpretation of the agreement a matter of dispute; it will also be necessary to consider whether the agreement reflects the real position or whether the conduct of the parties and other material placed on record show that the appellants were employees as suggested by the appellants and not commission agents as suggested on behalf of the respondents. Also, the only ground on which the State Government declined to make a reference was that the appellants were not workmen. This view is not so obvious or patent on the facts before us. In the circumstances, we think the best course is to set aside the order of the High Court and direct that the matter be gone into by an Industrial

Tribunal after the Government has made an appropriate order. we, therefore, allow these appeals, set aside the order of the High Court and direct the State Government to refer to an Industrial Tribunal all the disputes between the parties including the preliminary question whether the appellants are workmen within the meaning of Industrial Disputes Act or not.

The State Government is directed to make the above reference within a period of two months from today. In the meantime, in the interests of justice, status quo should be maintained by both the parties, as already directed by this Court on December 13, 1988. This shall continue for a period of ten weeks from today. This will not, however, preclude the respondents from taking such action against individual members of the appellants for misconduct, breach of the agreement or the like as may be open to them in law, in case any occasion should arise therefore. We wish to make it clear that in view of our above conclusion, we express no opinion on the findings contained in the judgment of the High Court on the evidence before it as to whether the appellants are workmen or not and leave the matter to be decided afresh by the Tribunal on the evidence led before it, unfettered by the findings of the High Court in this behalf."

The Division Bench of Hon'ble Rajasthan High Court in **Bhika Ram Vesus State of Rajasthan & Ors., 2001 (7) SLR 84** has held that the decision whether the workman had competed 240

days or not has to be adjudicated upon by the Labour Court and not the State. Their Lordships have observed as under:-

> **"The appellant workman was appointed on muster-roll basis as a workman in the Public Works Department, Sirohi Division on 1.10.87. In the month of July, 91, his services were terminated by an oral retrenchment order. He, therefore, moved the Conciliation Officer and Labour Welfare Officer, Sirohi- respondent No.5 raising industrial dispute about his illegal retrenchment from service on the ground that he has competed 240 working days in a calendar year with the respondent department. However, the respondent No.1 refused to refer the dispute to the Labour Court for its decision on the ground that the workman had not completed 240 working days in one calendar year, by his impugned order dated 16.4.93 (Ann. 2 to the writ petition). Aggrieved of that order, the appellant filed the writ petition No.2513/93 before this Court with a prayer to quash and set- aside the oral retrenchment order passed in July, 1991. The learned Single Judge after hearing both the learned counsel for the parties dismissed the writ petition by holding that the workman failed to prove that he had completed 240 working days in a calendar year, therefore, there was no violation of Section 25-F of industrial Disputes Act (for short 'the Act'). The learned Single Judge further held that the State Government had not committed any error in refusing to make the reference to the Labour Court for the correct adjudication of the dispute by the impugned order dated 16.4.93.**

In the case of Dhanbad Colliery Karamchari Sangh vs. Union of India and Ors. Reported in 1991 Supp (2) S.C.C. page 10, the Hon'ble Supreme Court has clearly held that the Government cannot itself decide the dispute. The said judgment in Dhanbad's case (supra) is clearly binding on us."

The Division Bench of the Hon'ble Punjab and Haryana High Court has held in **Sanjay Kumar Versus Union of India and others, 2003 (5) SLR 762** that while exercising the powers under Section 10(1) of the Industrial Disputes Act function of appropriate Government is an administrative function and not a judicial or quasi-judicial function and while performing the administrative function Government cannot delve into the merits or the dispute and take upon itself the determination of the lis.

The Hon'ble Supreme Court in **Ajaib Singh versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and Another, (1999) 6 SCC 82** has held that the provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the Industrial Disputes Act. The Hon'ble Supreme Court has further held that it is not the function of the Court to prescribe limitation where the legislature in its wisdom had thought it fit not to prescribe any period. Their Lordships of the Supreme Court have held as under:-

"It follows, therefore, that the provisions of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable to the proceedings under the Act and that the relief under it cannot be denied to the workman merely on the ground of

delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone. Even in a case where the delay is shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the work man till the date he raised the demand regarding his illegal retrenchment/termination or dismissal. The court may also in appropriate cases direct the payment of part of the back wages instead of full back wages. Reliance of the learned counsel for the respondent management on the Full Bench judgment of the Punjab and Haryana High Court in Ram Chander Morya v. State of Haryana is also of no help to him. In that case the High Court nowhere held that the provisions of Article of the Limitation Act were applicable in the proceedings under the Act. The Court specifically held "neither any limitation has been provided not any guidelines to determine as to what shall be the period of limitation in such cases". However, it went on further to say that

> **"reasonable time in the cases of labour for demand of reference or dispute by appropriate Government to labour tribunals will be five years after which the Government can refuse to make a reference on the ground of delay and laches if there is no explanation to the delay".**

We are of the opinion that the Punjab and Haryana High Court was not justified in prescribing the

limitation for getting the reference made or an application under Section 33-C of the Act to be adjudicated. It is not the function of the court to prescribe the limitation where the legislature in its wisdom had though it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding over the Court cannot be stretched to authorize them to interpret law in such a manner which would amount to legislation intentionally left over by the legislature. The judgment of the Full Bench of the Punjab and Haryana High Court has completely ignored the object of the Act and various pronouncements of this Court as noted hereinabove and thus is not a good law on the point of the applicability of the period of limitation for the purpose of invoking the jurisdiction of the courts/boards and tribunals under the Act."

The Hon'ble Supreme Court in **Mahavir Singh Versus U.P. State Electricity Board and Others, (1999) 9 SCC 178** has held as under:-

"In our view, the order passed by the High Court cannot be sustained. The services of the appellant Chowkidar were terminated by Respondent 1, the Board. The date of termination is 12-11-1976. He raised an industrial dispute though belatedly in March, 1983. Ultimately reference was made by the appropriate Government on 17-4-1984. The Labour Court adjudicated the reference and took the view that the termination was illegal. But considering the delay in raising the dispute, as a package 50% back wages were directed to be granted to the

appellant till reinstatement. Respondent 1 carried the matter in appeal before the High Court under Article 226 of the Constitution of India. The High Court took the view that as the dispute was raised belatedly, the reference itself was incompetent though agreeing with the Labour Court that on merits the termination order could not be sustained and it was illegal. It is this order of the High Court which is in challenge before us.

Once the termination is held to be illegal, we fail to appreciate how the entire reference could have been rejected. The dispute lingered on for a number of years. That would not mean that the dispute had ceased to exist. It is, of course, true that belatedly the dispute was raised but that has been taken care of by the Labour Court by not awarding full back wages but only 50% of the back wages all throughout from the date of termination till reinstatement. Such order as passed by the Labour Court could not be said to be in any way uncalled for and illegal."

The Hon'ble Supreme Court has held in **U.P. State Electricity Board Versus Rajesh Kumar, (2003) 12 SCC 548** that facts and circumstances of each are to be considered in dealing with the claims and appropriate reliefs to be granted. Their Lordships of the Supreme Court have held as under:-

"Per contra, the learned counsel for the respondent workman in his arguments supported the impugned judgment. He submitted that the position of law, as regards making a reference of a dispute, is well settled by the decisions of this Court. According to the learned counsel, merely

because there was delay in raising the dispute, reference itself was not incompetent; it is for the appropriate Government to make a reference on being satisfied as to the existence of the dispute; assuming that there is a delay in raising the dispute, that itself is not a ground to deny the relief to the workmen, but, depending on the facts and circumstances, the relief could be moulded. He added that this plea that the reference was not competent after delay of 19 years, was not raised before the Labour Court at all; for the first time it was urged before the high Court. He also pointed out that the appellant being in possession of the original document, nothing prevented it from placing it before the Labour Court, if the list produced by the workmen was not correct or names of workmen in the list of employees were not found. He also submitted that the appellant having sought time, failed to produce evidence, as is evident from the orders of the Labour Court. Under the circumstances, according to the learned counsel no fault can be found with the impugned judgment.

The Labour Court, on the basis of the evidence on record, has recorded a finding of fact that the respondent workmen did work for 240 days. This conclusion is based on the evidence of the workmen and the list of 82 employees, which included the names of the respondent workmen. It is also on record that the correctness of this list was not challenged before the Labour Court and the management did not produce any contra-evidence or the original records which it possessed to deny the claim or contention of the

workmen. Non-consideration of the evidence of the Executive Engineer who was examined on behalf of the appellant, in our view, did not affect the case in any way for the simple reason that he was not in service on the relevant date i.e. the dates on which the services of the respondent workmen were terminated. It is also clear from the impugned judgment that the point with regard to the stale claim of the workmen was not raised before the Labour Court. For the first time it was sought to be urged before the High Court. We may also add that if the appellant was really aggrieved and serious as to the stale claim of the respondent workmen, it was open to the appellant management to question the very reference made by the State Government in the year 1997 itself. The validity of the reference was not questioned. Thereafter, the management participated in the proceedings before the Labour Court and suffered the award. The management further, unsuccessfully, challenged the award of the Labour Court before the High Court. From the award of the Labour Court it is clear that the relief granted to the workmen was only with regard to the reinstatement with continuity of service. The back wages were awarded only from the date of reference and not from the dates of termination of their services. This is how the Court has moulded the relief. We are told that when the proceedings were pending in the High Court, the respondent workmen are already reinstated.

It is also not disputed by the learned counsel for the parties that there is no period of limitation as is prescribed for the parties in making the

reference. The facts and circumstances of each case are to be considered in dealing with the stale claims and appropriate reliefs are to be granted. We do not think it is necessary for us to examine the question of stale claims made by the learned counsel for the appellant in these cases, in the light of the facts narrated above and particularly, when the appellant did not challenge the order of reference made in the year 1997, at this stage. Thus looking from all angles, substantial justice is done in the matter. In this view, we decline to interfere with the impugned judgment. Consequently, the appeals are dismissed. No costs."

Similarly, the Hon'ble Supreme Court has held in **Shahaji Versus Executive Engineer, PWD, (2005) 12 SCC 141** that even if there is delay, the Labour Court can always mould the relief to be granted to the workmen. The Hon'ble Supreme Court has further held that the burden to raise plea of delay is on the employer. In this judgment, the Hon'ble Supreme Court has noticed the earlier judgment rendered in **Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society, (1999) 6 SCC 82.** Their Lordships have held as under:-

"We have heard counsel for the parties and we have also been taken through the judgments of this Court reported in Ajaib Singh v. Sirhind Coop. Marketing-cum-Processing Service Society, Nedungadi Bank Ltd. v. K.P. Madhavankutty and Sapan Kumar Pandit v. U.P. SEB. Having gone through the judgments we have no doubt that the judgment of this Court in Ajaib Singh case lays

down the law correctly. In the instant case there was no ground of delay urged by the management. Moreover, even if there was delay in making the reference to the Labour Court, if it came to the conclusion that the termination was illegal, it could have suitably moulded the relief to be granted to the workman in view of the delay. In such cases the award of back wages may either be not permitted or curtailed. In Nedungadi Bank case what was challenged before the High Court was the order making the reference. That was not a case where the Labour Court refused to entertain the dispute on the ground of delay. Having regard to the clear position in law we are left with no option but to allow this appeal and set aside the judgment and order of the High Court."

Their Lordships of the Hon'ble Supreme Court in latest judgment in **Asstt. Engineer, CAD, Kota Versus Dhan Kunwar, (2006) 5 SCC 481** has held that so far as delay in seeking the reference is concerned, no formula or universal application can be laid and it would depend on the facts of each individual case.

Accordingly, the writ petition is allowed. The annexure P-1, dated 19th April, 2007 is quashed and set aside. The respondent No.2 is directed to make a reference to the Labour Court-cum-Industrial Tribunal, Dharamshala on the basis of the demand notice sent by the workman to the XEN, HPSEB Division, Mandi on 24.9.2005 within a period of six weeks from the receipt of certified copy of the judgment. No order as to costs.

October 31, 2007. **(Rajiv Sharma), Judge.**
(sck)